

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

50696  
97281

FILE: B-180675, B-182214

DATE: May 23, 1975

MATTER OF: PSI-Peripheral Support Division of the Meson Corporation

## DIGEST:

1. Since protester did not question factual or legal soundness of prior decision in Matter of PSI-Peripheral Support Division of the Meson Corporation, B-180675, August 6, 1974, prior decision is affirmed.
2. Since interpretation and enforcement of criminal laws of the United States are functions of the Attorney General and the Federal courts, company claiming that third party deliberately misrepresented small business size status under small business set-aside awards is advised of right to request Department of Justice to consider claim in view of lack of facts of record which might have warranted General Accounting Office in reporting claim to Attorney General.
3. Notwithstanding postaward filing of small business size protest and stated applicability of SBA size determination (holding protested contractor was other than small business) for future procurements only, Department of the Air Force advises that failure of contracting officer to have given protester timely preaward notice of identity of apparently successful offeror (so as to enable timely size protest) in negotiated set-aside procurement, contrary to ASPR § 1-703(b)(1) and ASPR § 3-508.2(b), requires termination of contract in consonance with prior decision in Matter of PSI-Peripheral Support Division of the Meson Corporation, B-180675, August 6, 1974.

## BACKGROUND

This decision concerns small business set-aside awards made by the Department of the Navy under request for proposals (RFP) No. N00126-74-R-4N0336 and the Department of the Air Force under RFP No. F04606-74-R-0907.

## RFP - 4N0336

By letter dated August 26, 1974, PSI-Peripheral Support Division of the Meson Corporation (PSI), acknowledged receipt of our decision in Matter of PSI, B-180675, August 6, 1974, denying its protest (to

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the extent the company sought termination of the questioned award) against an award made by the Navy to Precision Components Division of Bell Industries, Inc. (Bell), under RFP-4N0336.

In its protest filed after award had been made, PSI contended that Bell was ineligible for the set-aside award because it was other than small business. The postaward filing of the protest was caused by the failure of the contracting officer to have given PSI timely preaward notice that Bell was the apparently successful offeror (in contravention of Armed Services Procurement Regulation (ASPR) § 1-703(b)(1) and ASPR § 3-508.2(b)) so as to enable the submission of a preaward size protest.

Bell was subsequently found by the Small Business Administration (SBA) to be other than small business. (Navy had previously advised SBA that, since PSI's size protest had been submitted after award, SBA's decision would have future application only.)

Notwithstanding the postaward nature of PSI's size protest and the future applicability of the SBA decision, we felt that the validity of Bell's award was affected because of the violation of ASPR § 1-703(b)(1) and ASPR § 3-508.2(b). But since the contract had been performed, we could not recommend corrective action.

PSI's August 26 letter stated that "\* \* \* false statements were made on the solicitation document by the division manager of Bell Industries, in violation of 18 U.S.C. 1001." Consequently, PSI requested "assistance from [our] Office in advising [PSI] of the steps to be taken and whose responsibility it is to initiate action."

The interpretation and enforcement of criminal laws of the United States are functions of the Attorney General and the Federal courts, and it is not within our jurisdiction to determine authoritatively what does or does not constitute a violation of a criminal statute.

SBA found Bell to be other than a small business because the company failed to complete and return SBA Form 355 (which requested detailed information about Bell's business) within the three working day time period stipulated for submission of the completed form

during the pendency of SBA's consideration of the size protest. Consequently, SBA was unable to furnish us with facts of record concerning Bell's business which might have warranted us in reporting the case to the Attorney General for the purpose of determining whether any violation of a Federal criminal law was involved.

However, we note that PSI may directly request that the Department of Justice consider the case if the company believes that the person who signed Bell's offer knowingly and willfully misrepresented that Bell was a small business for the procurement. Since PSI did not contest the factual or legal soundness of our August 6, 1974, decision, it is affirmed.

RFP - 0907

By letter dated September 5, 1974, PSI also protested the award of a total small business set-aside contract by the Department of the Air Force to Comp-Serv Company (Comp-Serv) and claimed that Comp-Serv (which has the same business address as Bell) was ineligible for award. This ineligibility, PSI asserted, was caused by Comp-Serv's intent not to comply with the RFP provision restricting possible subcontracting of end items to small business concerns. It was PSI's further view that Comp-Serv, whose offer was executed by the same person who executed Bell's offer under RFP - 4N0336, would subcontract the entire award to Bell which had been found to be other than a small business under RFP - 4N0336.

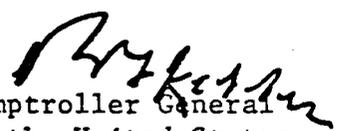
This size protest, like PSI's size protest under RFP - 4N0336, was submitted after award because of the failure of the contracting officer involved to have given PSI timely preaward notice (in contravention of ASPR § 1-703(b)(1) and ASPR § 3-508.2(b)) that Comp-Serv was the apparently successful offeror.

Subsequently, by message dated January 23, 1975, the Secretary of the Size Appeals Board, SBA, advised our Office that the Board had determined that Comp-Serv was other than small business "for the purposes of future procurements based on the firm's non-compliance with the request to submit complete SBA Form 355."

About the same time the SBA decision was issued, we received advice from the Air Force of its intent to terminate Comp-Serv's contract should SBA hold the company was other than small business. Notwithstanding the future applicability of the SBA decision, the Department reasoned that in consonance with our decision in Matter of PSI, supra, the validity of a negotiated small business set-aside award was affected when, as here, the contracting officer failed to give timely preaward notice of the identity of the apparently successful offeror which was subsequently found to be other than small business.

PSI's September 5 protest also "bring[s] to the attention of all parties concerned the requirements of 18 U.S.C. 1001" pertaining to representations in Comp-Serv's offer that it is a small business and that all supplies to be furnished by it will be manufactured or produced by a small business concern. We interpret this statement to be a request similar to the one discussed above under RFP - 4N0336 concerning PSI's feeling that violations of Federal criminal statutes may have occurred. What we said there, concerning the inability of SBA to furnish us with facts of record concerning Bell's business which might have warranted us in reporting the case to the Attorney General, is for application here in light of Comp-Serv's refusal to respond to SBA's inquiries concerning its business activities. Consequently, we again note that PSI may directly request that the Department of Justice consider the case if the company believes that knowing and willful misrepresentations of fact have been made.

Moreover, by letters of today to the Secretaries of the Navy and the Air Force, we are recommending that close scrutiny be given to any claims made by Bell or Comp-Serv of small business size status in future set-aside procurements in light of the failures of those concerns to complete SBA questionnaires during the pendency of the size protests, and subsequent findings by SBA that those firms were other than small business.

  
Deputy Comptroller General  
of the United States